

10-5-71

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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF THE REQUEST)
OF C. E. GRIMES REGARDING)
SURFACE WATER APPLICATION)
NO. 21644, C. E. GRIMES,)

Appellant,)

vs.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

PCHB No. 10

FINDINGS OF FACT,
CONCLUSIONS, AND ORDER

This matter is an appeal of a surface water application being granted L. B. Magart by respondent for the right to divert waters from Marshall Lake in the amount of .087 cubic feet per second, to a total withdrawal of 4.4 acre-feet a year. Appellant contends that the proposed withdrawal will impair his existing rights and that, further, there is no surplus water available for appropriation.

This appeal came on for hearing at 10 a.m., March 17, 1971, in the Assembly Room of the Spokane County Courthouse before the Pollution Control Hearings Board (Walt Woodward, hearing officer), with the appellant, C. E. Grimes, appearing and being represented by his attorney, Martin G. Weber; with the respondent, Department of Ecology, appearing through Wick Dufford, assistant attorney general; and with Mr. and Mrs. Alex Cooper, intervenors, appearing through their attorney, Robert McNichols.

At the outset of the hearing, counsel for respondent

objected to the admittance of testimony to support appellant's claim of an existing right to Marshall Lake water on the ground that neither respondent nor the Hearings Board has the legal right to adjudicate prior claims. Hearing officer took the matter under advisement and permitted appellant's line of testimony, subject to a ruling later on respondent's objection.

Witnesses on behalf of both appellant and respondent were sworn and testified, and exhibits were admitted. Counsel later filed written arguments.

On the basis of testimony heard and exhibits inspected, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

I.

Appellant is the owner of agricultural lands in Section 27, Township 32 North, Range 45 E.W.M., which have been irrigated at least since 1913 by a ditch and flume running from Marshall Lake in Section 23, Township 32 North, Range 45 E.W.M. Appellant irrigates about 60 acres and has 100 more acres suitable for irrigation. Appellant utilizes, for irrigation only, about one-third the 3 c.f.s. of water he withdraws from Marshall Lake, due to deterioration of the ditch and flume.

II.

Marshall Lake has about 194 acres in surface area and contains up to 12,943 acre-feet of water.

III.

The amount of water which the permit applicant, L. B. Magart, would be permitted to withdraw from the public waters of Marshall Lake is .087 c.f.s. to a total withdrawal of 4.4 acre-feet a year, and it is to be used for community domestic supply.

IV.

In terms of Marshall Lake's total water resource, appellant did not show that the amount of water sought for withdrawal is not available.

The Pollution Control Hearings Board makes the following

CONCLUSIONS OF LAW

I.

Claims such as appellant's which predate the 1917 water code, are subject to a statutory superior court action for the adjudication of water rights (RCW 90.03.110-240).

II.

The Department of Ecology, contrary to appellant's contention, does not have the right to adjudicate appellant's pre-1917 claimed right. This is a function reserved to the superior court as provided in RCW 90.03.110-240.

III.

The validity and the extent of the claimed pre-1917 right of the appellant, C. E. Grimes, not being subject to determination by the Department of Ecology (nor by the Pollution Control Hearings Board), the Department acted within the ambit of its authority in granting the permit to the applicant,

L. B. Magart, when it determined that there was public water available for appropriation. This does not preclude the appellant from establishing in the proper forum, if he can, that he has pre-1917 rights which give him a prior right to the water allocated to L. B. Magart by permit issued by the Department of Ecology.

DECISION

Based on these Findings and Conclusions, the Pollution Control Hearings Board affirms the Department of Ecology in granting to L. B. Magart, Surface Water Application No. 21644, subject to all pre-existing rights.

DONE at Olympia, Washington this 29th day of June, 1971.

POLLUTION CONTROL HEARINGS BOARD

Matthew W. Hill
Matthew W. Hill, Chairman

James T. Sheehy
James T. Sheehy, Member

Walt Woodward
Walt Woodward, Member